REMARKS/ARGUMENTS

Claims 1-7, 10-13 and 15-25 are pending in the application. Upon entry of this amendment, claims 1, 20, 21, 24 and 25 have been amended. The amendments are supported by the specification and claims as originally filed. No new matter has been introduced into the application. As explained in more detail below, Applicant submits that all claims are in condition for allowance and respectfully requests such action.

Rejection under 35 USC §112

Claims 24 and 25 were rejected under 35 U.S.C. 112, second paragraph, as being indefinite due to inclusion of the feature of green coffee bean extract, which is not recited in base claim 21. Claims 24 and 25 have been amended to clarify that "the botanically derived color stabilizer is chlorogenic acid from green coffee bean extract." The amendments are supported at least by Table 1 in the application as originally filed, which identifies chlorogenic acid as the C_3-C_6 phenylpropenoic acid compound derived from green coffee beans. Chlorogenic acid is recited in claim 21 as one of the group of botanically derived color stabilizers, thus dependent claims 24 and 25 are not indefinite and the objection is respectfully request to be withdrawn.

Rejection under 35 USC §102

Claims 1, 16-17 and 20-21 were rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 5,079,016 to Tood, Jr. ("Tood") as evidenced by Pharmacology of Rosemary. The Applicant respectfully disagrees. Claims 1 and 21 have been amended to delete β-Apo-8'-carotenal, canthaxanthin and β-carotene from the group from which the synthetic color is selected. Claim 20 has been amended to specify that the beverage includes a synthetic color selected from the group consisting of Citrus Red No. 2, D&C Red No. 28, D&C Yellow No. 10, FD&C Blue No. 1, FD&C Blue No. 2, FD&C Green No. 3, FD&C Red No. 3, FD&C Red No. 40, FD&C Yellow No. 5, FD&C Yellow No. 6, ferrous gluconate, orange B, riboflavin, ultramarine blue, ultramarine green, ultramarine violet and red, and combinations thereof. Tood

is directed to color stabilized synthetic and natural carotenoid compositions but is silent on any other synthetic colors. More specifically, Tood does not disclose at least the feature of the synthetic colors as recited in claims 1, 20 and 21, and thus cannot be considered to anticipate claims 1, 20 or 21. Claims 16-17 depend from claim 1 and are patentable over Tood for the same reasons as claim 1 and for the additional features recited therein.

Rejection under 35 USC §103

Claims 2-7, 10-13, 15, 18-19 and 22-23 were rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent 5,079,016 to Tood, Jr. ("Tood") as evidenced by Pharmacology of Rosemary in view of U.S. Patent No. 6,379,729 to Onishi et al. ("Onishi") and U.S. Patent No. 5,908,650 to Lenoble et al. ("Lenoble"). Tood is discussed above with respect to amended independent claims 1, 20 and 21. Briefly, Tood does not disclose at least the synthetic colors as recited in amended claims 1, 20 and 21. Further, Tood is directed to using certain emulsifiers, preferably with botanical extracts, for preserving the color of carotenoids, and states that the mechanism for the stabilizing effect is unknown. (See Col. 2, lines 6-10 and 13-19 of Tood) The disclosure of Tood, therefore, would not provide one of skill in the art a way to predict other combinations of colors and stabilizers that might be effective.

Onishi is directed to the use of sorbic acid or a salt of sulfurous acid to stabilize coal-tar color, anthocyanin color or carthamus yellow in a food that also contains ascorbic acid. (See Col. 4, lines 34-39 of Onishi) Onishi is silent on the synthetic colors recited in the pending claims. Furthermore, Onishi mentions naturally occurring flavonoids in the background art section, but does not identify for which colors the flavonoids were found to produce a low stabilizing effect. (See Col. 1, line 66 through Col. 2, line 3) Onishi is also silent on any mechanisms for the stabilization of color by sorbic acid, sulfurous acid or ascorbic acid. In fact, Onishi discloses that ascorbic acid and its derivatives stabilize certain colors, such as carotenoid colors, but actually promote the fading of other colors. (See Col. 1, lines 57-61 of Onishi) Onishi thus highlights the fact that while some combinations of colors and agents will stabilize the color, the agent may not stabilize different colors but may even assist in the degradation of

different colors. Accordingly, there would be no expectation of success for one of ordinary skill in the art to apply any of the elements of Onishi to a different composition for the purpose of color stabilization.

Lenoble is directed to the use of pigment-improving agents with anthocyanins. Anthocyanins are natural colors, and the pigment-improving agents are flavonoid glycuronides, flavonoid glucuronides and caffeic acid derivatives. The pigment-improving agents as disclosed by Lenoble would be undesirable for use in the embodiments of the pending claims because they are potent copigments that deepen the color and intensity of the dye. Paragraph [0025] of the specification as originally filed states that color imparted by stabilizing materials is unwanted. Lenoble is silent on at least the synthetic colors recited in the pending claims. Similar to Tood and Onishi, Lenoble does not provide specific disclosure regarding how the pigment-improving agents stabilize color. While Lenoble states that the pigment-improving agents increase the stability of the anthocyanins in the presence of light, heat and/or pH (See Col. 5, lines 31-33 of Lenoble), there is no suggested mechanism for the anthocyanin stabilization. Without an understanding of the underlying chemistry, one of ordinary skill in the art would not have been able to predict if any of the pigment-improving agents would stabilize other colors, such as the synthetic colors recited in the pending claims.

None of Tood, Onishi or Lenoble, either alone or in combination, discloses at least the recited synthetic colors or further, provides motivation to stabilize the synthetic colors with the recited C_3-C_6 phenylpropenoic acid compounds, as claimed. Consequently, amended claims 1, 20 and 21 are unobvious over Tood as evidenced by Pharmacology of Rosemary in view of Onishi and Lenoble. Claims 2-7, 10-13, 15, 18-19 depend from claim 1, claim 22 depends from claim 20 and claim 23 depends from claim 21, and are patentable over Tood, Onishi and Lenoble for the same reasons as claims 1, 20 and 21 and for the additional features recited therein.

Claims 24-25 were rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent 5,079,016 to Tood, Jr. ("Tood") as evidenced by Pharmacology of Rosemary in view of U.S. Patent Application Publication No. 2003/0003212 to Chien et al. ("Chien") and U.S. Patent No. 5,336,510 to Chang ("Chang"). The Applicant respectfully traverses the rejection. Claims

24 and 25 depend from independent claim 21, and Tood is discussed in detail above with respect to claim 21. Briefly, claim 21 is unobvious at least because Tood does not disclose the recited synthetic colors and there is no motivation to stabilize the synthetic colors with the recited botanically derived extracts. Chien and Chang do not remedy the deficiencies of Tood with respect to the claims. Chien merely discloses that chlorogenic acid may be obtained from green coffee bean extract and used to decrease the off-taste of a consumable. Chien is not related to color stabilization and does not disclose the claimed synthetic colors or further, the use of chlorogenic acid for color stabilization. Chang is directed to the use of riboflavin to stabilize synthetic azo dyes in solution in the presence of vitamin C, which is known to have a decoloring effect on azo dyes. (See Col. 3, lines 33-37 of Chang) Chang does not disclose any of the botanically derived color stabilizers as recited, and is concerned specifically with color degradation caused by vitamin C. Tood discloses a combination of emulsifiers with botanical extracts to stabilize carotenoids, but does not provide a mechanism for how the stabilization may occur, so there would be no expectation of success for one of skill in the art to employ a botanically derived stabilizer with a synthetic azo dye. Consequently, claims 24 and 25 can not be considered obvious in view of the disclosures of Tood in view of Chien and Chang. Reconsideration and withdrawal of the 35 U.S.C. 103(a) rejection is respectfully requested.

CONCLUSION

All rejections having been addressed, applicant respectfully submits that the instant application is in condition for allowance, and respectfully solicits prompt notification of the same. Should the Examiner have any questions, the Examiner is invited to contact the undersigned at the number set forth below.

The Commissioner is hereby authorized to charge any fees due or credit any overpayment of fees to Deposit Account No. 19-0733.

Respectfully submitted,

BANNER & WITCOFF, LTD.

Dated: July 9, 2007

By: 

Adrian L. Pishko
Reg. No. 57,800

BANNER & WITCOFF, LTD.
10 South Wacker Drive
Suite 3000
Chicago, IL 60606
Tel: (312) 463-5000
Fax: (312) 463-5001